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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL HENRY JAIMEZ et al., Defendants and Appellants.	B198897 (Los Angeles County Super. Ct. No. VA091996)

APPEAL from judgments of the Superior Court of Los Angeles County. Raul A. Sahagun, Judge. Affirmed with directions.

Charlotte E. Costan, under appointment by the Court of Appeal, for Defendant and Appellant Michael Henry Jaimez.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant Michael J. Salinas.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec and Ellen Birnbaum Kehr, Deputy Attorneys General, for Plaintiff and Respondent.

In a jury trial, appellant Michael Henry Jaimez (Jaimez) and appellant Michael T. Salinas (Salinas) were convicted of the first degree murder of Aaron Adagio (Aaron) (Pen. Code, § 187, subd. (a); count 1),[1] and the attempted willful, deliberate, and premeditated murder of Eddie Monroy (Monroy) and Rob Wilson (Wilson) (§§ 664/186, subd. (a); counts 2 & 3) and shooting into an occupied motor vehicle (§ 246; count 4). As to counts 1 and 4, the jury made findings that Salinas had personally used a firearm and discharged a firearm proximately causing death or great bodily injury. (§ 12022.53, subds. (b), (c) & (d).) As to counts 2 and 3, the jury made findings that Salinas had personally used and discharged a firearm. (§ 12022.53, subds. (b) & (c).)

SENTENCING

For Jaimez, for the count 1 murder, the trial court imposed a term of 25 years to life in state prison. For counts 2 and 3, the trial court imposed respectively, a consecutive term of 7 years to life and a concurrent term of life. The term imposed for count 4 was ordered stayed pursuant to section 654.

For Salinas, for the count 1 murder, the trial court imposed a term of 25 years to life in state prison, enhanced by a term of 25 years to life for the discharge of a firearm proximately causing death. For count 2, the trial court imposed a consecutive term of 7 years to life, enhanced by a term of 20 years for the discharge of a firearm. For count 3, the trial court imposed a concurrent term of life. It ordered stayed term imposed for count 4 pursuant to section 654.

Jaimez and Salinas appeal from the judgments.

THE CONTENTIONS

Jaimez contends: (1) on several grounds, the evidence is insufficient to support his convictions of murder and attempted murder and to support the jury findings of deliberation and premeditation; (2) evidence of the pursuit and Jaimez's postarrest statement were inadmissible; (3) the "wholesale admission" of gang evidence, including

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

references to the Mexican Mafia, were irrelevant and unduly prejudicial; and (4) charging the jury with CALJIC No. 2.52, concerning flight, was error. Jaimez joins in Salinas's contentions insofar as they will accrue to his benefit.

Salinas contends that (1) the evidence is insufficient to support his convictions of attempted murder and shooting into an occupied motor vehicle; (2) the trial court abused its discretion when it admitted the medical examiner's testimony concerning Aaron's state of mind immediately following the shooting; and (3) the abstract of judgment must be amended to reflect the proper enhancement imposed in count 2 with respect to the discharge of a firearm. Salinas joins in Jaimez's contentions insofar as they will accrue to his benefit.

We affirm the judgment and remand with directions requiring the trial court to make one correction in Salinas's abstract of judgment.

FACTS

The People's Case-in-Chief

On Saturday night, August 24, 2005, three young men, Aaron, Monroy and Wilson, who were about age 30, were hanging out at Aaron's Downey residence. They were drinking beer and socializing. Monroy testified that he only had a couple of beers and was not intoxicated. Shortly after midnight, they drove in Aaron's Volkswagen station wagon to a 7-Eleven store several blocks away in Pico Rivera. Aaron wanted to purchase a few more cans of beer.

At the 7-Eleven store, Aaron entered to make his purchase at the same time Jaimez and his former girlfriend, Deanne Ariza (Ariza), were inside the store. Aaron purchased the beer and left the 7-Eleven store. Aaron got into the driver's seat of his station wagon and started to drive out of the parking lot. As he was driving out, Jaimez and another youth, Salinas, approached with handguns.

Jaimez stood in front and to the side of the station wagon holding a nine-millimeter handgun in gloved hands. His presence there caused Aaron to stop, to put his station wagon in park, and to start to open the station wagon's door. Salinas was holding

a .22-caliber revolver in gloved hands and walked to the partially rolled-down window of Aaron's driver's door. Salinas lifted his .22-caliber revolver, cocked it with one hand, and fatally shot Aaron at close range in the head through the partially-open driver's door window. Salinas had an angry or mad expression on his face when he shot Aaron.

Monroy and Wilson quickly got out of the station wagon and ran. As Monroy ran, he heard two bursts of shots. He recalled that the sound of the gunshots indicated that the gunman was discharging only one firearm, but the two bursts of shots he heard—first two and then three shots—did sound different. A bystander corroborated that he heard additional gunshots after the initial gunshot. At trial, Monroy testified that he felt or heard bullets flying past them as they ran. Monroy and Wilson found separate hiding places down the street, and Monroy telephoned the police on his cellular telephone. Jaimez and Salinas got into Ariza's Chevrolet Blazer, and Ariza drove from the shooting scene.

Immediately before the shooting, Monroy had seen Jaimez waving as if he was beckoning Salinas from the Blazer to Aaron's station wagon. Also, Monroy could not hear what was said, but he could see Jaimez's mouth moving as if Jaimez was yelling at or talking to another person. After Jaimez and Ariza initially left the store with the beer they had purchased, Ariza returned to the store purportedly to purchase a soda for Salinas. Ariza was inside the store during the shooting. She was convicted of being an accessory and claimed in her testimony that she was testifying truthfully at trial in hopes of having her conviction reduced to a misdemeanor and obtaining a grant of probation. She testified that Jaimez and Salinas were Canta Ranas gang members and that she had driven Jaimez and Salinas to the store. They were the only two persons with her when she drove them to and from the 7-Eleven store.

Whittier Police Sergeant James Uhl testified as a gang expert. He corroborated that Jaimez and Salinas were Canta Ranas street gang members. He explained that the shooting occurred several blocks outside Canta Ranas gang territory. Monroy and Wilson testified that Aaron's general demeanor was happy, confident, "tough," and

fearless. Aaron was a stocky young man and was very athletic. The officer testified hypothetically that the shooting may have been gang-related. He explained that gang members expect others to respect and to fear them and to exhibit submissive behavior in their presence, especially as Jaimez was a "shot caller" in his gang.

The expert opined that Aaron's general demeanor as he was inside or as he left the 7-Eleven store may have been regarded by Salinas and Jaimez as disrespectful and a gang challenge. Fear and respect were important in the gang culture, and these gang members may have been insulted by Aaron's demeanor or a defiant look he may have given them, and they reacted violently. The expert explained that gang mores dictate that gang members always "have one another's backs" outside their own territory, and thus it was probable that two gang members participating in a shooting would be acting in tandem. The expert said that when gang members discharge their weapons, generally, they have the intent to kill. The expert gave his opinion that the shooting was committed for the benefit of a criminal street gang and that the shooting also would have enhanced an individual gang member's status within the gang.

Shortly after the shooting, a police officer found Salinas in possession of a loaded .22-caliber revolver that had to be manually cocked to be discharged. A ballistics expert opined that the bullet recovered from Aaron's head was consistent with having been discharged from Salinas's revolver. Later, Salinas was arrested for the murder in a hospital where he had registered under an alias and was being treated for injuries received in an unrelated shooting.

On February 23, 2006, a Los Angeles police officer attempted to stop a car leaving El Sereno at night. Its headlights were off. Jaimez and another male were passengers in the car. The female driver led the officers on a high speed chase from El Sereno to Bakersfield. After Jaimez's apprehension, at booking, Jaimez blurted out in front of a booking officer that "The b— was supposed to take me to Mexico."

The Defense

In defense, Jaimez called Monroy as a witness to further impeach his testimony.

At trial, 21-year-old Salinas testified that Jaimez and Ariza had driven him to the 7-Eleven store and that he shot Aaron. He claimed that as Jaimez and Ariza returned to Ariza's Blazer, he walked to the side of the store to relieve himself. He saw Aaron walking out of the store. Aaron's demeanor was aggressive. Aaron mumbled something at Salinas that Salinas could not hear. Aaron entered the driver's door of his station wagon and reached for something next to him, which made Salinas afraid that Aaron was trying to grab a firearm in order to shoot Salinas. Aaron looked as if he might reopen the car door, and Salinas shot Aaron in the head at close range through Aaron's open driver's window. Salinas claimed that he shot Aaron because he was afraid that Aaron was going to shoot him and that he had been afraid for his life. He denied that Jaimez played a role in the shooting. After the shooting, he and Jaimez left the parking lot in Ariza's Blazer. He did not see the two other occupants in the station wagon run from the parking lot, nor did he shoot at them.

Salinas claimed that he was armed because the area was dangerous. He said that the revolver later found in his possession was the weapon he used to shoot Aaron. He asserted that Jaimez was no longer "active" in the gang.[2]

DISCUSSION

I. The Contentions Asserting Insufficiency of the Evidence

A. *The Standard of Review*

Recently, in *People v. Whisenhunt* (2008) 44 Cal.4th 174, the California Supreme Court summarized the well-established standard of review. "'In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of

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[2] As to Jaimez, the jury declined to make true findings of the personal use of a firearm or the discharge of a firearm. As to Jaimez, the jury also failed to make a true finding that a principal was armed in the commission of the offense. As to Salinas and Jaimez, the jury found the allegations of a gang enhancement to be untrue.

solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence and to special circumstance allegations. [Citation.] "[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding." [Citation.] We do not reweigh evidence or reevaluate a witness's credibility. [Citation.]' [Citation.]" (*People v. Whisenhunt*, *supra*, at p. 200.)

""'Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category. [Citation.] To warrant the rejection of the statements given by a witness who has been believed by the [trier of fact], there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]" . . . .' [Citation.]" (*People v. Barnes* (1986) 42 Cal.3d 284, 303–304, 306.)

"'A reasonable inference, however, "may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence."' [Citation.]" (*People v. Raley* (1992) 2 Cal.4th 870, 891.)

B. Aiding and Abetting

All persons concerned in the commission of a crime, whether they directly commit the act constituting the offense, or aid and abet in its commission are principals in any act so committed. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1116.) The aider and abettor is

liable for the actual perpetrator's acts, as well as his own acts and mental state. (*Id*. at pp. 1118–1119.) To prove aiding and abetting, the prosecution must show that the defendant acted with the knowledge of the criminal purpose of the perpetrator and with an intent or purpose of either committing, or of encouraging, or of facilitating commission of, the offense. (*Id*. at p. 1118.) When the offense charged is a specific intent crime, the aider and abettor must share the specific intent of the perpetrator; this occurs when the aider and abettor knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime, i.e., where the charged offense and the intended offense are the same—where guilt does not depend on the natural and probable consequences doctrine—the aider and abettor must know and share the murderous intent of the actual perpetrator. (*McCoy, supra,* at p. 1118 & fn. 1.)

"[P]roof of aider and abettor liability requires proof in three distinct areas: (a) the direct perpetrator's actus reus—a crime committed by the direct perpetrator, (b) the aider and abettor's mens rea—knowledge of the direct perpetrator's unlawful intent and an intent to assist in achieving those unlawful ends, and (c) the aider and abettor's actus reus—conduct by the aider and abettor that in fact assists the achievement of the crime. [Citation.]" (*People v. Perez* (2005) 35 Cal.4th 1219, 1225.) "[F]or a defendant to be found guilty under an aiding and abetting theory, someone other than the defendant must be proven to have attempted or committed a crime; i.e., absent proof of a predicate offense, conviction on an aiding and abetting theory cannot be sustained." (*Ibid*.)[3]

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[3] The jury was instructed with CALJIC Nos. 3.00 and 3.01 concerning aiding and abetting. The trial court did not charge the jury as to the natural and probable consequences doctrine.

C. Eyewitnesses Testimony Was Sufficient to Support Jaimez's Judgment

Jaimez contends that Monroy's and Wilson's trial testimony was inconsistent and so thoroughly impeached that it failed to support Jaimez's convictions.

This contention by Jaimez appears to be directed at three issues: (1) inconsistent verdicts and findings; (2) the reliability of Monroy's and Wilson's testimony; and (3) the sufficiency of the evidence concerning whether Jaimez aided and abetted Salinas during the shootings.

It is settled that any inconsistency in the verdicts and findings is irrelevant to a reviewing court's independent evaluation of the sufficiency of the evidence. "The United States Supreme Court has explained: '[A] criminal defendant . . . is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts. This review should not be confused with the problems caused by inconsistent verdicts. Sufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilty beyond a reasonable doubt. [Citations.] This review should be independent of the jury's determination that evidence on another count was insufficient.' [Citation.]" (*People v. Lewis* (2001) 25 Cal.4th 610, 656.) An inconsistency between the verdicts and findings show no more than jury lenity, compromise, or mistake, none of which undermines the validity of a verdict. (*Ibid*.)

Thus, this court's sufficiency-of-the-evidence review is not limited by the jury findings as to Jaimez that no principal was armed during the shooting and that Jaimez did not personally use or discharge a firearm.

Our review of the record demonstrates that Monroy's and Wilson's testimony was not improbable nor was it patently false. Nor did the witnesses' testimony demonstrate any physical impossibility. Identity and whether Salinas had shot Aaron was not truly at issue. In their trial testimony, Salinas and Ariza corroborated that Salinas and Jaimez were present during the shooting and that Salinas had discharged the fatal bullet from his

revolver. Salinas's trial testimony put at issue his intent when he shot Aaron, whether Salinas or Jaimez shot at Monroy or Wilson, and Jaimez's complicity in the shootings.

Monroy's and Wilson's trial testimony was credible, reliable, and of solid value. At trial, Monroy explained that he had had a few beers, but he was not too intoxicated to drive. Wilson denied that he, Monroy, and Aaron had been drinking alcoholic beverages prior to the confrontation with Salinas and Jaimez, and he said that Aaron wanted to drive to the store to purchase one beer. Monroy's and Wilson's testimony established that it was Jaimez who initially approached the station wagon holding a nine-millimeter pistol. The approach caused Aaron to brake, to put the Volkswagen in park, and to start to open or crack his driver's door. As this was occurring, Monroy observed that Jaimez looked as if he was yelling at or talking to someone, and Jaimez beckoned to someone. Salinas suddenly appeared at the driver's door next to Aaron. Salinas quickly lifted the revolver in his gloved hands, pulled back on its hammer, and shot Aaron in the head at close range through the driver's window.

Monroy and Wilson got out of the station wagon and ran for their lives. They ran together, with Monroy leading, down Passons Boulevard toward Slauson Avenue. As they ran, Monroy heard more shots in two intervals that he believed sounded as if they were being discharged from the .22-caliber revolver. At trial, Monroy testified that the sounds of the discharging bullets made him believe that the man with the revolver was shooting at them. He claimed to have heard bullets flying past them as he and Wilson ran.

Wilson testified that he was focused on running for his life and that he heard no yelling or shots. A doorman at an adjacent business claimed that he heard the initial shot and two to four shots thereafter.

Such evidence was reliable and provided an adequate factual basis for the jury to have concluded that Salinas or Jaimez and Salinas fired shots at the fleeing men. That testimony also supported jury findings that Jaimez was an aider and abettor to murder, attempted murder, and the discharge of a firearm into an occupied motor vehicle.

Moreover, the trial evidence established that Jaimez and Salinas were close friends and fellow gang members. The gang expert testified hypothetically that the scenario suggested a gang-related motive for the murder: gang members would view a confident demeanor exhibited by another male who was not a fellow gang member as disrespectful and challenging, especially when displayed in the presence of a gang shot caller. The expert testified that it would be expected that two gang members who were together outside their territory would "be backing each other up" and acting in tandem. Further, Jaimez was a gang shot caller, and Salinas was a more junior gang member who was still "putting in work" for the gang. The expert's testimony provided a basis for a reasonable inference, along with Jaimez's conduct at the time of the shooting, that Jaimez participated in and probably orchestrated the shootings.

Also, the gang expert testified hypothetically that gang members had motives for shooting at Aaron's fleeing companions. Gang members would want to eliminate witnesses to the shooting to avoid apprehension. Additionally, shooting at Aaron's companions would instill fear in Monroy and Wilson. The expert added that when gang members discharge firearms at others, generally they intend to kill. Such evidence would support any jury conclusion that Jaimez aided and abetted the shootings. (*In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094–1095 [the issue of aiding and abetting is a factual issue, and "[a]mong the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense," including flight].)

Concerning the two counts of attempted intentional, deliberate, and premeditated murder, the trial evidence was that multiple shots were fired following the discharge of a firearm at Aaron. There was a pause and then Monroy heard different sounding gunshots. Such evidence would have supported a jury conclusion that Jaimez, or Jaimez and Salinas, discharged their firearms at the fleeing Monroy and Wilson. (*In re Andrew I.* (1991) 230 Cal.App.3d 572, 578 [except where additional evidence is required

by statute, the direct evidence from one witness who is entitled to full credit is sufficient for proof of any fact].)

The jury was not required to accept at face value Salinas's trial testimony that Jaimez played no role in the shootings. (See *People v. Snow* (2003) 30 Cal.4th 43, 66 [issues of witness credibility are within the purview of the jury].) The trial evidence was sufficient to support jury conclusions that Jaimez aided and abetted the charged crimes or participated in shooting at Monroy and Wilson. The record complies with the requirements of due process. (*Jackson v. Virginia* (1979) 443 U.S. 307, 315; *People v. Rowland* (1992) 4 Cal.4th 238, 269.)

Insofar as Jaimez complains that the trial court failed to properly weigh the evidence during the motion for new trial so as to make its own independent evaluation of the evidence's sufficiency, this additional claim lacks merit. In ruling on Jaimez's motion, the trial court said: "The issue is whether there are sufficient facts to support the verdict. I think there are. I don't see any new facts . . . presented which would cause me to grant a new trial." We presume that the trial court was aware of its obligations in ruling on a motion for new trial and that it properly considered and weighed the evidence independently so as to determine the evidence's sufficiency in supporting Jaimez's convictions. (See *People v. Robarge* (1953) 41 Cal.2d 628, 633 [on a motion for new trial, the defendant is entitled to two decisions on the evidence, one by the jury and the other by the trial court].)

D. Salinas's Contention Concerning the Counts 2 and 3 Attempted Murders

Citing the evidence of intoxication and Monroy's arguably impeached claim that he heard bullets "whizzing" past him and Wilson, Salinas contends that Monroy's testimony is too unreliable to support Salinas's convictions of attempted murder.

In this case, as soon as Salinas fatally shot Aaron, Monroy and Wilson got out of the station wagon and ran away together as quickly as possible. They were afraid they would be followed and shot. Salinas had an angry look on his face when he had shot Aaron. As Monroy ran, he heard five to seven more gunshots. He said that he looked

back because he wanted to make sure that he was running away from the assailants and away from the direction in which the guns were pointing. When he looked back, he realized that the assailants were not chasing them, and he could see the men standing in silhouette in front of the store still shooting. He testified that the shots sounded as if "they were out in the open, like aiming towards us running." Monroy said that he could not tell which assailant was firing, but it sounded as if it was the same gun.

During cross-examination, Monroy testified that he "could have swor[n]" that he heard bullets flying past him as he ran. Beginning with the third shot, the sounds of the discharge sounded "open just like in the air . . . louder, little louder." Monroy admitted that at the preliminary hearing he had testified that he had "no idea" whether there were bullets flying past him and that he "just figured they were flying by." At that time, he admitted that he had also said that he did not hear any bullets flying by. Monroy explained that initially he had been shaken up by the incident but as time went by, he continued to recall more and more about the shooting. When he had time to think about it further, he was certain he had heard the bullets. Three or four months after the shooting, he recalled hearing the bullets and told his friends about it. Salinas's trial counsel pointed out that the preliminary hearing was over a year after the shooting, and on that date, Monroy had claimed that he did not remember hearing the bullets. Monroy explained that at the preliminary hearing, he was still not "all there" and that he recalled the bullets "whizzing past" today, but he probably did not recall that at the preliminary hearing.

On redirect examination, Monroy said that he heard five shots: two shots, a pause, and then three shots. He described the latter gunshots as sounding different than the initial shots.

Monroy was also called as a defense witness. At that time, he testified that he was familiar with the sound of a .22-caliber firearm as he had owned such a firearm. He opined that the sound of a nine-millimeter pistol discharging would sound similar but slightly louder than that of a .22-caliber firearm. Monroy acknowledged that a

.22-caliber handgun would make a "popping noise" and that was what he had heard after the initial shot. He clarified his previous statements, as follows: "Yeah, because after the first fire there was a little gap. As I was running, I noticed there was a little silent moment. Then I started hearing more shots consecutive. They sounded different than the initial shot because they were out in the open. You know, I was in the car when the first shot was heard as I ran outside." Trial counsel asked whether he had heard the "popping sound" he described earlier in his testimony, and Monroy replied, "Yeah." Trial counsel inquired whether it was the "popping sound of a .22?" and Monroy replied: "I don't know if I said .22 popping sound. First one definitely, but after, it sounded louder because it was outside. I was in a different position. I was running." Monroy was asked whether he told the detective that the shots he heard were all from the .22-caliber firearm. Monroy said, "Okay. Well, they sounded like it was the same gun, just consecutive shots."

On redirect examination, the prosecutor clarified that what Monroy had told the detective was that "they were two different types of sounds of guns," and Monroy agreed that was what he had told the detective.

Wilson testified that when he ran, he was focused only on running as fast as he could. He did not hear any yelling or gunshots.

John Perez, the doorman for the nightclub next door to the 7-Eleven store, heard one gunshot, a pause, and then two gunshots. Perez told the detective that he heard three or four gunshots and that he then saw the white Blazer quickly leaving the scene containing three occupants. The detective testified that a .22-caliber revolver and a nine-millimeter pistol would make different sounds; the nine-millimeter weapon would make the louder noise upon discharge.

The deputy medical examiner testified that during the autopsy, he found a single gunshot wound to Aaron's left forehead near the hairline and above the left eyebrow. A ballistics expert testified that the bullet the deputy medical examiner recovered during the autopsy was consistent with having been discharged from the .22-caliber revolver

recovered from Salinas shortly after the shootings. At trial, Monroy identified that same .22-caliber revolver as the murder weapon. The gang expert testified that gang members generally intend to shoot to kill and that gang members would have a motive to eliminate witnesses and to shoot at witnesses for the purpose of intimidating them.

The above evidence was sufficient to support a conclusion that Salinas shot Aaron and then turned to shoot at Monroy and Wilson as they ran from the station wagon. (See *People v. Cuevas* (1995) 12 Cal.4th 252, 276–277.)

E. Evidence Was Sufficient to Support the Finding of Deliberation and Premeditation as to the Attempted Murders

Jaimez contends that there is "no solid evidence of premeditation and deliberation in connection with the attempted murders" and asks that the jury finding of deliberation and premeditation (§ 664, subd. (a)) be set aside.

"A murder that is premeditated and deliberate is murder of the first degree. (§ 189.) 'In this context, "premeditated" means "considered beforehand," and "deliberate" means "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action."' [Citation.] 'An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse.' [Citation.] A reviewing court normally considers three kinds of evidence to determine whether a finding of premeditation and deliberation is adequately supported—preexisting motive, planning activity, and manner of killing . . . . [Citations.]" (*People v. Jurado* (2006) 38 Cal.4th 72, 118–119.)

Such evidence need not be present in some special combination or be accorded a particular weight, nor is the list exhaustive. (*People v. Pride* (1992) 3 Cal.4th 195, 247; *People v. Perez* (1992) 2 Cal.4th 1117, 1125; *People v. Garcia* (2000) 78 Cal.App.4th 1422, 1427.) Rather, such factors serve as an aid to assess whether the killing or attempted killing was the result of preexisting reflection. (*People v. Perez, supra,* at p. 1125.)

"A verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill. [Citation.] 'Deliberation' refers to careful weighing of considerations in forming a course of action; 'premeditation' means thought over in advance. [Citations.] 'The process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . ." [Citations.]' [Citation.]" (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.)

The principles that demonstrate willful, deliberate, and premeditated murder similarly apply to the finding of deliberation and premeditation that requires enhanced punishment for attempted murder. (*People v. Bright* (1996) 12 Cal.4th 652, 656, overruled on other points in *People v. Izaguirre* (2007) 42 Cal.4th 126, 132–134, and *People v. Seel* (2004) 34 Cal.4th 535, 550, fn. 6; *People v. Garcia*, *supra*, 78 Cal.App.4th at pp. 1427–1428.)

Applying the above principles to the facts, the evidence supports the true findings of deliberation and premeditation. The bringing of a lethal weapon to the crime scene is evidence demonstrating planning. (*People v. Wharton* (1991) 53 Cal.3d 522, 547.) In the gang culture, Aaron's dominating and "tough" demeanor in the presence of a gang shot caller, such as Jaimez, provides an adequate motive for the violent response that occurred. (See *People v. Ramos* (2004) 121 Cal.App.4th 1194, 1208.) Further, the shooting at Monroy and Wilson showed that Salinas and Jaimez wanted to eliminate witnesses to the initial shooting or to intimidate those who failed to "respect" them. (See *People v. Hovarter* (2008) 44 Cal.4th 983, 1019.) The pause during the shooting and the different sounds the discharging firearm or firearms made constituted sufficient evidence supporting any jury conclusion that Salinas *and* Jaimez discharged their firearms at Monroy and Wilson. Moreover, the evidence was sufficient for the jury to conclude that Jaimez aided and abetted the shooting. The combined evidence of planning and motive supports the jury's findings that the attempted murders were deliberate and premeditated.

F. Evidence Was Sufficient Against Salinas as to Shooting at an Occupied Motor Vehicle

Salinas contends that the evidence is insufficient to support his conviction of shooting at an occupied motor vehicle within the meaning of section 246.

Section 246 proscribes the following conduct: "Any person who shall maliciously and willfully discharge a firearm at an inhabited dwelling house, occupied building, occupied motor vehicle . . . is guilty of a felony . . ." "[S]ection 246 is a general intent crime. [Citation.] . . . [It] is violated when a defendant intentionally discharges a firearm either directly at a proscribed target (e.g., an inhabited dwelling house or occupied building) or in close proximity to the target under circumstances showing a conscious disregard for the probability that one or more bullets will strike the target or persons in or around it. No specific intent to strike the target, kill or injure persons, or achieve any other result beyond shooting at or in the general vicinity or range of the target is required." (*People v. Overman* (2005) 126 Cal.App.4th 1344, 1361.)[4]

Salinas argues on appeal that Wilson testified that Salinas cocked the gun and raised it to fire. Wilson said that Salinas "put [the revolver] through the window and fired." Wilson further explained, "He [Salinas] pointed it through the window at Aaron." Salinas urges that such evidence is insufficient to demonstrate a violation of section 246 because the barrel of the gun was inside the Volkswagen when it was discharged, and a

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[4] In pertinent part, the jury was instructed with the elements of this offense, as follows: "Every person who willfully and maliciously discharges a firearm at an occupied vehicle is guilty of the crime of shooting at an occupied vehicle . . . Shooting at [a] particular object is not limited to shooting directly at that object. [The commission of the offense] also includes shooting [in] such close proximity to the target that a probable consequence of the shooting is that one or more bullets either will strike the target or persons in or around and shooter. In order to prove this crime, each of the following elements must be proved: 1. The person discharged a firearm at an occupied vehicle and; 2. The discharge of the firearm was willful and malicious. [¶] . . . [¶] The word malice and maliciously means a wish to vex, annoy or injure another person or intent to do [a] wrongful act."

violation of section 246 requires that the firearm be discharged from outside the motor vehicle.

Appellant cites the decision in *People v. Stepney* (1981) 120 Cal.App.3d 1016. There, Stepney had forcibly entered a residence looking for a man who owed money to a "syndicate." Not finding the man, Stepney stood inside the man's living room and shot at his television set. On appeal, the reviewing court reversed the section 246 conviction because " . . . the firing of a pistol within a dwelling house does not constitute a violation of Penal Code section 246." (*Stepney, supra,* at p. 1021; see also *People v. Morales* (2008) 168 Cal.App.4th 1075, 1081–1082 [shooting into a kitchen from an attached garage does not constitute shooting at an inhabited structure because the shooting occurred inside the structure].)

Despite the decision in *Stepney*, Salinas's conduct falls within the purview of section 246. This is not a situation where Salinas was convicted of violating section 246 after he fired a revolver "at" the vehicle while seated inside or from the interior of that vehicle. At best, Wilson's testimony was conflicting with respect to the position of the end of the revolver's barrel in relation to the window or the open driver's door at discharge. Further, there was soot on the outside of the driver's window indicating that the revolver was discharged near, but outside the driver's window of the station wagon, which was cracked open four inches. The deputy medical examiner's finding corroborated that the revolver was a distance from Aaron's head as the deputy medical examiner found the shooting to have been from an intermediate distance from Aaron's forehead, as contrasted with a contact wound or a wound effected at close range. On this record, the trial evidence was sufficient to support the jury's conclusion that Salinas discharged his revolver "at" an occupied motor vehicle.[5]

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[5] The forensic evidence supports the theory that Salinas shot Aaron through the car window, which had been rolled down several inches. But Monroy testified that Salinas had shot Aaron through the slightly open driver's door. Regardless of which testimony the jury might have believed, this court would nevertheless conclude that the evidence

II. Admissibility of the February 2006 Pursuit and Jaimez's Postarrest Statement

Jaimez contends that the circumstances of his arrest and his postarrest statement, which were admitted as probative of flight and consciousness of guilt, were too remote in time to be admitted into evidence. We disagree.

A. Background

The shooting occurred on August 24, 2005. On February 23, 2006, Los Angeles Police Officer Jorge Alfaro attempted to stop a vehicle that was driving out of El Sereno at night with its headlamps turned off. Jaimez was one of two male passengers in the car. The car's driver, a female, feigned stopping twice and then led a Los Angeles police helicopter and eight to 10 police units on a high speed pursuit toward Bakersfield. On the 710 Freeway, the occupants threw items out of the vehicle. Finally, in Kern County, on Highway 99, California Highway Patrol units put out a spiked strip on the highway and stopped the vehicle, and appellant was arrested. During booking at Hollenbeck Station, the booking officer heard appellant spontaneously tell his cousin (presumably the other male occupant in the pursued car), "The b— was supposed to take me to Mexico."

In an Evidence Code section 402 hearing, the prosecutor indicated that the vehicle's occupants had discarded items during the pursuit, including a vial of a controlled substance. Jaimez objected on grounds of relevance and the remoteness of the pursuit and of his postarrest statement to the shooting. The trial court ruled that the testimony was more probative than prejudicial, with the exception of the nature of the items discarded during the pursuit. It remarked that the jury could draw a reasonable inference from the evidence that Jaimez had participated in or directed the pursuit because on the 710 Freeway, he and the others threw items of contraband out of the car.

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indicates that Salinas was guilty of violating section 246 as he shot into the station wagon from its exterior.

B. The Analysis

Appellant complains that the testimony concerning the pursuit and his postarrest statement should have been excluded because: (1) there was no evidence that he had control over the female driver and her decision to engage in the pursuit; (2) the pursuit was remote in time as it occurred six months after the instant shooting; and (3) the statement was too graphic and prejudicial because it contained the "pejorative" term "b—," which, in effect, constituted bad character evidence.

Evidence is relevant if it tends to prove or disprove any contested issue at trial. (Evid. Code, § 210; *People v. Scheid* (1997) 16 Cal.4th 1, 13–14.) Section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." We review a trial court's ruling admitting evidence for an abuse of discretion. (*People v. Horning* (2004) 34 Cal.4th 871, 900.)

The trial court properly exercised its discretion when it admitted the evidence of flight. The evidence was relevant because shortly after the shooting, the detective had caused the photograph of Jaimez and Ariza taken by the 7-Eleven's security camera to be published in the local newspaper. It was reasonable to assume from the photograph's publication and Jaimez's close relationship with the gang, Salinas, and Ariza, that Jaimez was well aware that he was wanted at least for questioning in relation to the shooting. Ariza testified that she saw her photograph in the newspaper article and that was what caused her to turn herself in. Jaimez's pursuit and arrest occurred a mere six months following the instant shooting.

The evidence concerning the pursuit and the postarrest statement supported a reasonable inference that during the pursuit, Jaimez had a hand in directing the female driver as to what to do. Jaimez was in the car for some time during the pursuit. As the occupants, including Jaimez, had apparently disposed of illegal contraband during the pursuit, it is reasonable to assume that they influenced the flight or could have stopped it

if they wished to do so. A reasonable inference to be drawn from appellant's statement to his cousin after his arrest was that he was on his way to Mexico when the officers attempted to stop him leaving El Sereno, and the female was driving at his direction.

It is well established that "the facts of each case determine whether it is reasonable to infer that flight shows consciousness of guilt" and "[c]ommon sense . . . suggests that a guilty person does not lose the desire to avoid apprehension for offenses as grave [as these] after only a few weeks." (*People v. Mason* (1991) 52 Cal.3d 909, 941.) Also, it is "'for the jury to determine the weight, if any,"' of such evidence. (See *Mason, supra,* at p. 942.) Given these legal principles, the trial court properly exercised its discretion by admitting the flight evidence and Jaimez's postarrest statement that he intended to leave the country for a location that was out of the reach of local law enforcement.

The trial court also properly exercised its discretion when it ruled that any danger of undue prejudice associated with the evidence failed to outweigh the evidence's probative value. (*People v. Scott* (1959) 176 Cal.App.2d 458, 506–507 [flight occurred one year after crime]; cf. *People v. Kipp* (2001) 26 Cal.4th 1100, 1126 [ordinarily an attempt or plan to escape from jail pending trial is relevant to establish consciousness of guilt].)

Jaimez complains that his postarrest statement should have been excluded at trial. He argues that the use in his statement of the word, "b—" was inflammatory and that the statement was not probative. This complaint was forfeited as Jaimez made no objection on this ground in the trial court. (*People v. Partida* (2005) 37 Cal.4th 428, 431 [a defendant may not argue on appeal that the court should have excluded the evidence for a reason not asserted at trial].) At appellant's request, the trial court excluded what it deemed to be the inconsequential and inflammatory evidence of the discarding of the narcotics contraband during flight. Jaimez's use of the term "b—" is not so inflammatory in context as to require the trial court to have excluded that evidence on its own motion. The inferences to be drawn from the pursuit and Jaimez's postarrest statement were issues to be decided by the jury.

III. The Modified Version of CALJIC No. 2.52

Jaimez contends that the trial court erred in removing the word "immediately" from the pattern instruction on flight, CALJIC No. 2.52. He claims error pursuant to section 1127c. We disagree.

A. Background

Section 1127c, provides: "In any criminal trial or proceeding where evidence of flight of a defendant is relied upon as tending to show guilt, the court shall instruct the jury *substantially* as follows: [¶] The flight of a person *immediately* after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine. [¶] No further instruction on the subject of flight need be given." (Italics added.)

Here, the jury was instructed: "The flight of a person after the commission of a crime or after he is accused of a crime is not sufficient in itself to establish his guilt but it is a fact which, if proved, may be considered by you in light of all other proved facts in determining whether the defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide."[6]

B. The Analysis

Jaimez contends that removing the word "immediately" from the pattern instruction on flight constitutes *Chapman* error. (*Chapman v. California* (1967) 386 U.S. 18, 24.) However, where a defendant believes that jury instructions are incomplete or

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6 The CALJIC No. 2.52 pattern instruction provides, as follows: "The [flight] [attempted flight] [escape] [attempted escape] [from custody] of a person [immediately] after the commission of a crime, or after [he] is accused of a crime, is not sufficient in itself to establish [his] guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide."

need elaboration, he has the obligation to request additional or clarifying instructions. The failure to make such a request in the trial court forfeits the contention on appeal. (*People v. Dennis* (1998) 17 Cal.4th 468, 514.) Jaimez's contention is not cognizable on appeal because he failed to request a modification or change to the modified flight instruction given to the jury. (*People v. Bolin* (1998) 18 Cal.4th 297, 326; see *People v. Loker* (2008) 44 Cal.4th 691, 705–706.)

Further, the contention is meritless. "Penal Code section 1127c requires that whenever evidence of flight is relied on to show guilt, the court must instruct the jury that while flight is not sufficient to establish guilt, it is a fact which, if proved, the jury may consider. This statute was enacted to abolish the common law rule that the jury could not be instructed on flight unless there was evidence defendant knew he had been accused. [Citations.]" (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1243; see also *People v. Najera* (2008) 43 Cal.4th 1132, 1139, quoting from *People v. Hill* (1967) 67 Cal.2d 105, 120–121.) The instruction given here was appropriate as Jaimez's engagement in the pursuit and his spontaneous exclamation at booking raised reasonable inferences of flight and of consciousness of guilt. (*People v. Williams* (1988) 44 Cal.3d 1127, 1145; *People v. Cowger* (1988) 202 Cal.App.3d 1066, 1076–1077; see *People v. Dieguez* (2001) 89 Cal.App.4th 266, 277.) It is settled that "giving of an instruction on flight in language which varies slightly from that of section 1127c is not error." (*People v. Hill, supra,* at p. 120.) Moreover, common sense suggests that a guilty person does not lose the desire to avoid apprehension for offenses as grave as this after only a few days. (*People v. Loker, supra,* 44 Cal.4th at p. 706, quoting from *People v. Mason, supra,* 52 Cal.3d at p. 941.)

Even if the lapse of time required a further instruction that the People had to show that Jaimez was aware that he was wanted by the police before they could draw an inference that he had consciousness of guilt (see *People v. Pensinger, supra,* 52 Cal.3d at p. 1244), there was evidence in the record supporting a reasonable inference that Jaimez was aware that he was wanted. In any event, the evidence of flight was inconsequential

when considered in the light of the other evidence of guilt. As such, any failure to give a proper jury instruction is harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see also *People v. Silva* (1988) 45 Cal.3d 604, 628.)

IV. The Gang Evidence

Jaimez contends that the wholesale admission of gang evidence, including references to the Mexican Mafia, was gratuitous, inflammatory, unduly prejudicial, and was probably considered by the jury as bad character evidence. Jaimez acknowledges that gang evidence is admissible on issues of identity, motive, modus operandi, the means of applying force or fear, and intent, as long as the expert does not render an opinion on whether a defendant had the specific intent necessary to commit the charged offenses. Nevertheless, Jaimez complains that the gang officer's testimony that Jaimez was affiliated with the Mexican Mafia was "overkill." He asserts that such evidence improperly influenced the jury to find Jaimez guilty, despite a finding that the gang enhancement was untrue.

A. Background

During trial, Whittier Police Sergeant Uhl gave his opinion that Jaimez was a Canta Ranas gang member and explained the bases for that opinion. One basis was a photograph of Jaimez posing with other Canta Ranas gang members and displaying Canta Ranas gang hand signs. On the back of the photograph was written "Cartoon Demon Canta Ranas X3." The sergeant testified that the notation "X3" meant "13," which refers to the 13th letter of the alphabet "M" and indicates that the gang is affiliated with "EME" or the Mexican Mafia.

During cross-examination, trial counsel asked whether a gang member with tattoos on his head was advertising his gang affiliation when he had let his hair grow long and he was wearing a cap. The sergeant replied that based on prison gang intelligence, the EME had recently issued direct orders that gang members should wear hats and cover their tattoos to avoid police apprehension, especially when they were transporting illicit drugs.

B. The Relevant Legal Principles

"[A]s [a] general rule, evidence of gang membership and activity is admissible if it is logically relevant to some material issue in the case, other than character evidence, is not more prejudicial than probative and is not cumulative. [Citation.] Consequently, gang evidence may be relevant to establish the defendant's motive, intent or some fact concerning the charged offenses other than criminal propensity as long as the probative value of the evidence outweighs its prejudicial effect. [Citations.] 'Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.]' [Citation.] Nonetheless, even if the evidence is found to be relevant, the trial court must carefully scrutinize gang-related evidence before admitting it because of its potentially inflammatory impact on the jury. [Citations.] [¶] . . . [T]he decision on whether evidence, including gang evidence, is relevant, not unduly prejudicial and thus admissible, rests within the discretion of the trial court. [Citation.]" (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223–225 (*Albarran*).)

C. The Analysis

As appellant acknowledges, and the People explain in their briefing, the expert gang testimony was relevant to explain the gang culture so that the jury had the background upon which to make determinations on the crucial issues in this case of motive and intent and the probability of joint actions by the gang members in carrying out an ambush. (*Alberran*, *supra*, 149 Cal.App.4th at p. 223.) And, regardless of the jury's ultimate decision rejecting a true finding on the gang enhancement, the expert testimony was of assistance to the jury in determining whether the evidence supported that gang enhancement. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047–1048.) The trial court properly exercised its discretion when it ruled that while the evidence had

the potential to be inflammatory, the evidence was so probative to the issues in the case that any danger in its use was outweighed by its relevance.

As for the gang expert's comment on the Canta Ranas affiliation with the Mexican Mafia, appellant apparently never objected to this evidence and has thus forfeited the issue. (*People v. Partida*, *supra*, 37 Cal.4th at pp. 433–435.) Furthermore, the expert's comment on the Mexican Mafia affiliation was short and fleeting, and no emphasis was placed on this evidence. Even if the trial court had suddenly stricken the evidence on its own motion, that conduct might have unduly emphasized the reference to the arguably inflammatory evidence. Any reference to the Mexican Mafia at trial was at worst harmless error.

Moreover, it was Jaimez's trial counsel who elicited the evidence concerning the EME directive, and trial counsel made no motion to strike the officer's testimony after the fact or to have the jury instructed on the proper consideration of such evidence. The sergeant's reply was relevant to rebut a defense claim that Jaimez's failure to display gang tattoos during the shooting or to have a gang appearance negated any inference of intent to participate in the shooting as an aider and abettor. Any complaint about the sergeant's testimony concerning the EME's directive to affiliated gang members elicited by the defense was thus forfeited when trial counsel made no effort to blunt its force by an objection, a motion to strike, or a jury instruction. (*People v. Blankenship* (1959) 171 Cal.App.2d 66, 83.)

This case is distinguishable from the decision in *Albarran, supra*, 149 Cal.App.4th 214. In *Albarran*, the prosecution "presented a panoply of incriminating gang evidence, which might have been tangentially relevant to the gang allegations, but had no bearing on the underlying charges." (*Id*. at p. 227.) The gang expert in *Albarran* even testified that the circumstances of the shooting made it impossible to determine whether the shooting was committed with a gang motive. (*Ibid*.) There, the reviewing court concluded that references to the Mexican Mafia and to gang threats to police officers had little or no bearing on the material issues of guilt, and the wholesale use of such evidence

was "overkill." (*Id*. at p. 228.) Also, the use of so much marginally relevant and inflammatory gang evidence created a substantial risk of the misuse of gang evidence as bad character evidence. (*Id.* at pp. 227–228.) Nor was anything in the facts of that shooting to suggest a specific gang motive.

Here, the use of the gang evidence was highly relevant to the issues in the case. The testimony of Monroy and Wilson provided a basis for the use of the gang evidence concerning motive. They testified that Aaron was fearless and had an athletic and self-confident attitude. The expert testified that such a demeanor was all that was necessary to serve as a challenge to a gang with the "bravado" that the Canta Ranas had. Also, the gang evidence was relevant to the issue of whether Jaimez and Salinas acted in tandem and whether Jaimez aided and abetted the shootings. The one initial and unnecessary reference to the Mexican Mafia in the prosecution's evidence was so inconsequential in light of the entire trial evidence that we cannot conclude that its use denied Jaimez due process and a fair trial. (*People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1081; *Jammal v. Van de Kamp* (1991) 926 F.2d 918, 920.)

V. The Admissibility of the Deputy Medical Examiner's Testimony

Salinas contends that permitting the deputy medical examiner to testify to Aaron's state of mind after he was shot was an abuse of discretion as that evidence was irrelevant and unduly prejudicial. He also complains that the evidence amounted to victim impact evidence that when admitted during the guilt phase of a trial that constitutes a violation of due process and the Eighth Amendment. We find no merit in the contention.

A. Background

After the deputy medical examiner testified as to the cause of death—a single gunshot wound to the head—the prosecutor asked how the bullet killed Aaron. The deputy medical examiner replied that the brain has the consistency of Jello. When a bullet perforates the brain, it disrupts the many nerves and causes bleeding. The bullet passed through Aaron's entire skull and lodged against the skull on the other side, but it did not hit the brain stem. Consequently, such a wound was not "instantly fatal." The

deputy medical examiner explained that the disruption to the brain and the subsequent swelling would have caused death, and death would have taken "several minutes." The expert commented that there was evidence of medical treatment on the body so Aaron may have been briefly maintained on life support.

The prosecutor asked the deputy medical examiner whether Aaron would have been aware that he was dying. Trial counsel objected that the question asked for an answer beyond the expertise of the deputy medical examiner. The trial court overruled the objection, and the deputy medical examiner replied, "Most likely."

During cross-examination, Jaimez's trial counsel elicited that the deputy medical examiner could not say whether Aaron was aware of his injury. Trial counsel asked the deputy medical examiner whether Aaron would have been conscious if after the shooting, he had slumped forward over the wheel and gone limp. The deputy medical examiner replied that in such case, Aaron was probably unconscious and unaware. Jaimez's trial counsel then elicited the concession from the deputy medical examiner that he had believed the prosecutor's inquiry was a hypothetical that assumed that Aaron was conscious subsequent to the shooting. However, he was unaware of any finding in his autopsy or in the evidence that indicated that Aaron was conscious after he was shot.

B. The Analysis

The contention is not cognizable on appeal as during the trial, Salinas objected on grounds that the question sought evidence beyond the expertise of the deputy medical examiner. That is not the same ground as is raised on appeal. As such, the contention is forfeited. (*People v. Boyette* (2002) 29 Cal.4th 381, 424.)

On the merits, the trial court properly exercised its discretion when it ruled that the deputy medical examiner could testify as to the means of Aaron's death and whether hypothetically Aaron was aware of his circumstances briefly following the shooting. Such evidence was at best only marginally more prejudicial than the evidence that Salinas executed the 30-year-old Aaron by fatally shooting him at close range through the brain with his .22-caliber revolver and that Aaron immediately slumped over the steering

wheel and his blood was splattered all over Wilson. Trial counsel's thorough cross-examination demonstrated that the deputy medical examiner's testimony on this point was based on a false premise. Thus, this court deems any error to be harmless. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

Also, given the other trial evidence, the evidence was not so inflammatory that its use denied Salinas due process or resulted in unreliable guilt determination. (See *Payne v. Tennessee* (1991) 501 U.S. 808, 825–830 [overruling two previous United States Supreme Court decisions that victim impact testimony was inadmissible at a capital sentencing hearing].)

VI. The Abstract of Judgment

Salinas contends that his abstract of judgment improperly reflects the verdicts and findings by the jury and asks that the abstract of judgment be amended. We will make the order he requests.

Salinas points out that the abstract of judgment improperly states that as to count 2, the jury made a finding pursuant to section 12022.53, subdivision (d), in lieu of the proper finding made by the jury pursuant to section 12022.53, subdivision (c). We agree there is error in the abstract of judgment, and we will order it corrected.

VII. The Joinder in the Various Contentions Made by the Coappellant

Jaimez and Salinas have each requested to join in the other's contentions if the contention would result in a reversal. We have examined each contention made by appellants. No contention made by either appellant will assist the other.

DISPOSITION

The judgments are affirmed with directions.

After the remittur issues, the superior court shall cause its clerk to amend Salinas's abstract of judgment with respect to count 2, attempted murder, insofar as it reflects that the jury found true a discharge of a firearm enhancement pursuant to section 12022.53, subdivision (d), in lieu of the proper true finding in count 2 of the discharge of a firearm pursuant to section 12022.53, subdivision (c).

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ